

The Honorable Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STORMANS, INCORPORATED doing business as
RALPH'S THRIFTWAY; RHONDA MESLER,
MARGO THELEN,

Plaintiffs,

v.

MARY SELECKY, Acting Secretary of the
Washington State Department of Health; LAURIE
JINKINS, Assistant Secretary of Washington Health
Systems Quality Assurance; GEORGE ROE,
SUSAN TIEL BOYER, DAN CONNOLLY, GARY
HARRIS, VANDANA SLATTER, REBECCA
HILLE, ROSEMARIE DUFFY, Members of the
Washington Board of Pharmacy; KATHY BAROS
FRIEDT, ELLIS CASSON, DEBORAH SIOUS
CANO-LEE, JERRY HEBERT, SHAWN
MURINKO, Commissioners for the Washington
Human Rights Commission; MARC BRENMAN,
Executive Director of the Washington Human
Rights Commission,

Defendants.

Case No. C07-5374-RBL

MOTION TO INTERVENE

**NOTE ON MOTION CALENDAR:
August 31, 2007**

Oral Argument Requested

1 Pursuant to Fed. R. Civ. P. 24(a), Judith Billings, Rhiannon Andreini, Jeffrey
2 Schouten, Molly Harmon, Catherine Rosman, Emily Schmidt, and Tami Garrard (together,
3 “Proposed Intervenor”) jointly move for leave to intervene as of right as defendants in this
4 action. In the alternative, Proposed Intervenor request permission to intervene under Fed. R.
5 Civ. P. 24(b). Defendants Selecky, Jenkins, and Board of Pharmacy have indicated that they
6 support this request for intervention.

7 Each of the Proposed Intervenor is a Washington resident with an interest that is
8 threatened by this lawsuit—ensuring timely access to lawfully prescribed medications or
9 medications with restricted access. Ms. Andreini, Ms. Harmon, Ms. Rosman, Ms. Schmidt,
10 and Ms. Garrard are women of child-bearing age who are concerned about ensuring that they
11 have access to emergency and other contraception. Ms. Billings and Dr. Schouten are both
12 HIV positive, and have an interest in ensuring timely access to the life-saving medications
13 necessary to manage their illnesses. In addition to his personal interest in access to HIV
14 medications, as an HIV health care provider, Dr. Schouten is concerned about his patients’
15 timely access to life-saving drugs.

16 The regulations at issue in this action protect the interests of the Proposed Intervenor
17 and other Washington residents like them. By setting forth the responsibilities of pharmacies
18 and pharmacists regarding the dispensation of medication, the regulations ensure that patients
19 have timely access to lawfully prescribed and medications with restricted access. If Plaintiffs
20 succeed in this action and the regulations are invalidated, the Proposed Intervenor’s ability to
21 ensure that they can access the medication they need will be greatly impaired. Because the
22 Proposed Intervenor have unique, particularized interests, they will not be adequately
23 represented by the current parties. For the reasons set forth below, the motion to intervene
24 should be granted.

25 **I. FACTS**

26 **A. Background Facts Relating To The Pharmacy and Pharmacist Rules.**

27 Effective July 26, 2007, the Washington State Board of Pharmacy amended regulations
28 setting forth the responsibilities of pharmacies and pharmacists regarding the dispensation of

1 medication. The adopted rules are intended to ensure that patients have timely access to
 2 lawfully prescribed and clinically safe drugs. Explanatory Letter at 1 (Declaration of Rima J.
 3 Alaily in Support of Defendant-Intervenors' Opposition to Motion for Preliminary Injunction,
 4 ("Alaily Decl."), Ex. B).

5 The Pharmacy Rule, WAC 246-869-010, imposes a duty on a pharmacy to dispense all
 6 lawful prescriptions or provide a therapeutic equivalent in a timely manner. WAC 246-869-
 7 010(1).¹ A pharmacy may not avoid dispensing medication by referring a patient to another
 8 pharmacy; the rule requires "pharmacies to meet the pharmaceutical needs of their patients."
 9 *See also* Explanatory Letter at 3 (Alaily Decl., Ex. B). The Pharmacist Rule, WAC 246-863-
 10 095, makes it "a pharmacist's primary responsibility to ensure patients get safe and appropriate
 11 medication therapy." *Id.* at 2. A pharmacist cannot delegate to pharmacy support staff the
 12 decision whether to dispense a lawfully prescribed drug or device. WAC 246-863-095(2)(j).
 13 Moreover, a pharmacist may be disciplined if he or she destroys or refuses to return an unfilled
 14 lawful prescription, violates a patient's privacy, discriminates against patients, or intimidates
 15 or harasses a patient. WAC 246-863-095(4). A pharmacist may ask another pharmacist on
 16 duty to provide the medication, but in all cases the *pharmacy* must dispense the medication in
 17 a timely manner. The purpose of these regulations is "to promote patient safety by assuring
 18 that patients have access to lawful, appropriate medications without delay." Explanatory
 19 Letter at 1 (Alaily Decl., Ex.B).

20 **B. Background Facts Relating To The Litigation.**

21 On July 25, 2007, Plaintiffs filed suit against Defendants Selecky and Jenkins, officials
 22 within the department of Department of Health, members of the Board of Pharmacy, and the
 23 Commissioners and Executive Director of the Human Rights Commission, seeking to
 24 invalidate the Rules. Plaintiff Stormans Incorporated, which owns and operates a pharmacy in
 25 its grocery store, refuses for "moral and religious reasons" to allow its pharmacists to dispense
 26 Plan B. Storman Decl. ¶ 17. Similarly, Plaintiffs Rhonda Mesler and Margo Thelen are
 27

28 ¹ A pharmacy is excused from this duty in certain expressly enumerated circumstances. *Id.*

1 pharmacists who refuse to dispense Plan B for religious reasons. Mesler Decl. ¶¶ 11-12;
 2 Thelen Decl. ¶¶ 7-8. None of the Plaintiffs allege any injury as a result of the Rules, but
 3 Plaintiffs contend that the Rules impermissibly burden their free exercise of religion, violate
 4 the Equal Protection Clause, conflict with the Civil Rights Act of 1964, and deny them
 5 procedural due process. The day after filing their initial complaint, on July 26, 2007, Plaintiffs
 6 filed an Amended Complaint, along with a motion seeking a preliminary injunction. *See* Dkt.
 7 Nos. 8-9. Pursuant to the parties' stipulation and the Court's August 8, 2007 order, the motion
 8 is noted for August 17, 2007. *See* Dkt. No. 34.

9 **C. Background Facts Relating To The Intervenor.**

10 The Proposed Intervenor are all Washington residents who have an interest in
 11 ensuring that they have timely access to lawfully prescribed and clinically safe drugs.

12 **Dr. Jeffrey T. Schouten.** Dr. Schouten is a Clinical Assistant Professor of Surgery at
 13 the University of Washington, a primary care physician at Washington's largest HIV-specialty
 14 clinic, and the current chair of the Governor's Advisory Council on HIV/AIDS. Schouten
 15 Decl. ¶ 3-5.² Dr. Schouten (who provided testimony in favor of the Board of Pharmacy Rules
 16 during the rule-making process) knows that timing is critical to effective treatment and
 17 prevention of HIV. For instance, following exposure to HIV, a treatment of combination anti-
 18 retroviral therapy can substantially reduce a patient's risk of contracting HIV, but there is a
 19 short window of effectiveness. The treatment must be started quickly after exposure; after 72
 20 hours, it is largely ineffective. *Id.* ¶ 7. Timing is also critical for individuals managing HIV
 21 through chronic therapy. HIV medication must be taken daily, and missing even a couple of
 22 doses could allow the HIV virus to resume replicating and develop resistance to the drug. It is
 23 crucial that individuals undergoing chronic therapy for HIV are able to access refills of their
 24 medications without delay. *Id.* ¶ 8. Dr. Schouten, who is HIV positive, wishes to ensure that
 25 he and his patients have timely access to necessary medication. *Id.* ¶ 11.

27 ² This brief refers to the Defendant-Intervenor's declarations filed herewith using the following
 28 short form: "[Defendant-Intervenor] Decl."

1 **Judith Billings.** Ms. Billings is an education professional and former elected state-
 2 wide official. She holds a juris doctorate from Seattle University, and has been active in
 3 education and public service for more than 40 years. Billings Decl. ¶¶ 3, 4. Ms. Billings
 4 contracted the HIV virus in the early 1980s from a medical procedure. *Id.* ¶ 6. She takes HIV
 5 medications daily, and knows that being able to access appropriate medications in a timely
 6 manner is critical to her survival. *Id.* ¶ 9. If she needs an emergency refill, she must go to a
 7 pharmacy to obtain it. Because going without the appropriate medications for even a short
 8 time can cause serious health consequences, she wants to ensure that her health and survival
 9 will not be put at risk by a pharmacist or pharmacy who will not fill a prescription. *Id.* ¶ 10.

10 **Molly Harmon.** In 2003, Molly Harmon became concerned that the method of
 11 contraception she was using had failed, so she telephoned her doctor and received a
 12 prescription for “Plan B,” a form of emergency contraception. Harmon Decl. ¶ 5. Ms.
 13 Harmon obtained a prescription from her doctor, and went to the Bartell Drugs at University
 14 Village in Seattle. *Id.* ¶¶ 6-7. The pharmacist on duty told Ms. Harmon that Plan B was not a
 15 form of birth control and that she could provide Ms. Harmon with information about other
 16 forms of birth control. *Id.* Ms. Harmon, extremely upset, asked to speak to the head
 17 pharmacist who ultimately filled her prescription. *Id.* ¶ 8. Ms. Harmon left the pharmacy
 18 angered about having to defend an intimate decision that had been made between herself, her
 19 partner, and her doctor, to a complete stranger. *Id.* ¶ 9.

20 **Emily Schmidt.** Ms. Schmidt has also experienced difficulties obtaining Plan B. Ms.
 21 Schmidt is a single, 22 year-old-woman who was born and raised in Wenatchee, Washington.
 22 Schmidt Decl. ¶¶ 3-4. In March 2007 Ms. Schmidt requested Plan B at two pharmacies in
 23 Wenatchee. *Id.* ¶¶ 7-9. At both she was informed that the pharmacy could not honor her
 24 request because the pharmacy or pharmacist was unwilling to dispense Plan B. *Id.* ¶ 8-9.

25 **Rhiannon Andreini.** Ms. Andreini had a similar experience in November 2005, while
 26 visiting Mukilteo, Washington. She went to the Albertsons pharmacy to buy Plan B when her
 27 regular method of contraception failed. Andreini Decl. ¶ 6. The pharmacist refused to provide
 28 Ms. Andreini with Plan B, stating that the store did not carry it. *Id.* When she asked the

1 pharmacist where else she could go, the pharmacist provided her with the name of another
 2 pharmacy but would not provide her with directions. *Id.* Upset with the cold and
 3 disapproving manner in which the pharmacist treated her and unfamiliar with the area, Ms.
 4 Andreini cut her vacation short and returned to Bellingham the next morning to go to a
 5 pharmacy that she knew would dispense Plan B. *Id.*

6 **Catherine Rosman.** Ms. Rosman is a married, 22-year-old woman who lives in
 7 Spokane, Washington. She has taken Plan B on two occasions, and in both cases chose to
 8 obtain the medication from Planned Parenthood because she feared being subjected to
 9 judgment or harassment. Rosman Decl. ¶ 5. Ms. Rosman works as a case manager at a Young
 10 Woman's Christian Association (YWCA) shelter assisting women and adolescent girls who
 11 have been subjected to domestic violence. *Id.* ¶ 4. As part of her work, she has been asked on
 12 several occasions about the possibility of obtaining emergency contraception. Because she has
 13 heard numerous accounts of pharmacists who refused to fill emergency contraception
 14 prescriptions or otherwise acted in a hostile or harassing manner to those seeking such
 15 prescriptions, she advises that women go to Planned Parenthood rather than pharmacies to
 16 ensure that they are treated with respect. *Id.* ¶ 6. An active member of Spiritual Youth for
 17 Reproductive Freedom, an organization dedicated to educating, organizing, and empowering
 18 young adults to put their faith into action and advocate for pro-choice social justice, she has an
 19 interest in ensuring that she, along with other women in need, can get timely access to
 20 emergency and other forms of contraception. *Id.* ¶ 8-9.

21 **Tami Garrard.** Ms. Garrard is a single 31-year-old woman. Garrard Decl. ¶ 3. If her
 22 current method of birth control failed, she would likely use Plan B to prevent an unintended
 23 pregnancy. *Id.* ¶ 4. It is important to her to have timely access to such medications if the need
 24 were to arise. *Id.* ¶ 5.

25 **II. ARGUMENT**

26 **A. The Proposed Intervenor Should Be Granted Intervention as of Right Pursuant to Rule 24(a).**

27 Rule 24(a) of the Federal Rules of Civil Procedure permits intervention as of right if:

28 (1) the motion to intervene is timely; (2) the proposed intervenor claims a significantly

1 protectable interest relating to the property or transaction which is the subject of the action; (3)
 2 the proposed intervenor is so situated that the disposition of the action may as a practical
 3 matter impair or impede its ability to protect that interest; and (4) the proposed intervenor's
 4 interest is inadequately represented by the parties to the action. *Southwest Center for*
 5 *Biological Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). The Rule is to be
 6 construed liberally in favor of potential intervenors. *Id.* at 818. Further, a district court is
 7 required to accept as true all non-conclusory allegations made in support of an intervention
 8 motion. *Id.* at 819-20.

9 As demonstrated below, the Proposed Intervenors easily meet each of these four
 10 criteria. As such, the Proposed Intervenors should be allowed to intervene as a matter of right.

11 **1. The Proposed Intervenors' motion to intervene is timely.**

12 In determining whether a motion to intervene is timely, the court considers: (1) the
 13 stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for and length of
 14 the delay. *United States ex rel. McGough v. Covington Techs.*, 967 F.2d 1391, 1394 (9th Cir.
 15 1992). All of these criteria are met. Once this action was initiated, the Proposed Intervenors
 16 lost no time in filing this motion to intervene. This action was filed on July 25, 2007, and this
 17 motion comes less than three weeks later. No parties can possibly be prejudiced by the timing
 18 of this motion to intervene; indeed, Defendants Selecky, Jinkins, and Board of Pharmacy have
 19 indicated that they welcome this request for intervention. The Proposed Intervenors have
 20 complied with all existing deadlines, including the deadline for opposing Plaintiffs' Motion for
 21 a Preliminary Injunction.³ See Defendant-Intervenors' Opposition to Motion for Preliminary
 22 Injunction (attached as Ex. 1); Alaily Decl. (attached as Ex. 2). Furthermore, discovery has
 23 not yet begun, and the parties' joint status report is not due until early October. Because this
 24 request is timely and comes during the very preliminary stage of this case, the Proposed
 25 Intervenors' request should be granted.

26
 27 ³ Furthermore, the Proposed Intervenors intend to comply with the deadline to answer or
 28 otherwise respond to Plaintiffs' Amended Complaint.

1 **2. The Proposed Intervenor have significant protectable interests in**
 2 **the subject of the action.**

3 Intervention as of right is also appropriate because the Proposed Intervenor have
 4 significant protectable interests at stake. Indeed, the Proposed Intervenor's interests in this
 5 action far exceed what is required by the rule.

6 The Ninth Circuit has stated that the "interest" requirement is a threshold requirement
 7 rather than "the determinative criterion for intervention." *County of Fresno v. Andrus*, 622
 8 F.2d 436 (9th Cir. 1980) (holding farmers' group potentially seeking to purchase land was
 9 entitled to intervene as of right in an action challenging regulations governing land sales). "It
 10 is generally enough that the interest [asserted] is protectable under some law, and that there is
 11 a relationship between the legally protected interest and the claims at issue." *Southwest*
 12 *Center*, 268 F.3d at 818 (internal quotations omitted). The Ninth Circuit has previously
 13 recognized that economic interests, such as that protected by contract, are sufficient interests to
 14 warrant intervention under Fed. R. Civ. P. 24(a). *See id.* at 820. *See also Forest Conserv.*
 15 *Cncl. v. United States Forest Serv.*, 66 F.3d 1489, 1495 (9th Cir. 1995).

16 The Proposed Intervenor's interests at issue here—the interest in ensuring timely
 17 access to lawfully prescribed and clinically safe drugs—far exceeds that required for
 18 intervention under Rule 24. Ms. Andreini, Ms. Harmon, Ms. Rosman, Ms. Schmidt, and Ms.
 19 Garrard have an interest in ensuring access to emergency and other contraception. *See, e.g.*,
 20 Andreini Decl. ¶¶ 3, 7. Ms. Billings and Dr. Schouten are HIV positive, and have an interest
 21 in ensuring access to the life-saving medications they need to manage their illness. Billings
 22 Decl. ¶ 6; Schouten Decl. ¶¶ 10, 11. Dr. Schouten, as a health care provider for HIV patients,
 23 has an additional interest in ensuring that his patients have timely access to appropriate
 24 medication. Schouten Decl. ¶ 11. These interests are legally protected by Washington law,
 25 including the regulations that are being challenged in this action. For example, RCW
 26 § 18.64.005, the statutory authority for the rulemaking at issue, provides in relevant part that
 27 the Board shall "[p]romulgate rules for the dispensing . . . of drugs and devices and the
 28 practice of pharmacy for the protection and promotion of public health, safety, and welfare."

1 RCW 18.64.005(7). Moreover, the Proposed Intervenor's interest in access to contraception is
 2 constitutionally protected. *Carey v. Population Services International*, 431 U.S. 678 (1977).

3 **3. The Proposed Intervenor's ability to protect their interests may be**
 4 **impaired by the disposition of this action.**

5 The outcome of this action will have a direct and substantial impact on the Proposed
 6 Intervenor's ability to protect their interest in ensuring timely access to lawfully prescribed and
 7 clinically safe drugs. The Rules, which Plaintiffs seek to invalidate, are intended to protect the
 8 interests of the Proposed Intervenor and the interests of other Washington citizens like them.

9 The Rules are intended to prevent the harms to public health and safety that could
 10 result from a pharmacist's refusal—regardless of the reasons behind it—to fill valid
 11 prescriptions or dispense emergency contraception. *See* Notice of Proposed Rule-Making
 12 (Alaily Decl., Ex. I). For the Proposed Intervenor, such an incident could not only cause
 13 emotional distress and expense, but have more serious consequences. If Ms. Billings, Dr.
 14 Schouten, or one of Dr. Schouten's patients were denied HIV medications, it could lead to
 15 serious health risks, because timely access to medication is critical to the effective
 16 management of their illness. Billings Decl. ¶¶ 9-10; Schouten Decl. ¶¶ 7-8. Similarly, the
 17 effectiveness of Plan B decreases hourly; if Ms. Andreini, Ms. Harmon, Ms. Rosman, Ms.
 18 Schmidt, or Ms. Garrard were denied Plan B the resulting delay could lead to an unintended
 19 pregnancy.

20 Without the protection of the Rules, the Proposed Intervenor would have little
 21 assurance that they could obtain lawful medication and contraception from their pharmacies.
 22 This is particularly true for rural women, who have access to fewer pharmacies. If Plaintiffs
 23 succeed in this action, the Rules will be invalidated, and the Proposed Intervenor will be
 24 directly and adversely impacted. They are entitled, therefore, to intervene in this action to
 25 protect their interests.

26 **4. The Proposed Intervenor's interests are not adequately represented**
 27 **by the existing parties to the action.**

28 Finally, the Proposed Intervenor have unique, personal interests that will not be
 adequately represented in this action unless they are able to intervene. The State Defendants

1 have a broad constituency—they represent all Washington citizens, including pharmacists such
 2 as Plaintiffs Thelan and Mesler. In contrast, the Proposed Intervenors represent a unique
 3 subset of this constituency who, in some cases, have been harassed or outright denied
 4 necessary medication. Given the minimal showing of inadequacy required and the importance
 5 of the Proposed Intervenors’ interests at stake in this action, their request must be granted.

6 The proposed intervenor’s burden on this requirement “should be treated as minimal.”
 7 *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). A proposed
 8 intervenor need not show that the representation is, or will be, inadequate. *Conserv. Law*
 9 *Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992). Instead, a proposed intervenor need
 10 only show that the representation of his interests “may be” inadequate. *Id.* Courts generally
 11 consider three factors when making this determination: (1) whether the interest of a present
 12 party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2)
 13 whether the present party is capable and willing to make such arguments; and (3) whether a
 14 proposed intervenor would offer any necessary elements to the proceedings that other parties
 15 would neglect. *County of Fresno*, 622 F.2d 436 at 438-39. A court must resolve any doubts
 16 on the question of adequacy of representation in favor of permitting intervention. 6 Moore’s
 17 Federal Practice § 24.03[4][a][i] (2007).

18 The Proposed Intervenors’ interests in this action are sufficiently different from the
 19 State Defendants’ interest that they will not be adequately represented if unable to intervene.
 20 The Proposed Intervenors have unique, personal interests in ensuring access to emergency
 21 contraception and HIV medication. The State Defendants have a broad constituency—they
 22 represent all Washington citizens—and are obligated to serve the public interest. Indeed,
 23 Plaintiffs Thelan and Mesler are part of the constituency represented by the State Defendants.
 24 In contrast, the proposed intervenors represent a unique subset of this constituency whose
 25 private interests diverge from the overall public interest. For example, unlike the State
 26 Defendants, Proposed Intervenors have no interest in making arguments about the enforcement
 27 mechanisms or cost effectiveness of the Rules. Because the Proposed Intervenors’ personal
 28 interests in achieving timely access to medications could potentially conflict with those of the

1 State Defendants, intervention is warranted. Indeed, as noted by the Ninth Circuit in *Forest*
 2 *Conservation Council*, “[i]nadequate representation is most likely to be found when the
 3 applicant asserts a personal interest that does not belong to the general public.” 66 F.3d at
 4 1499 (quoting 3B Moore’s Federal Practice, Par. 24.07[4] at 24-27 (2d ed. 1995)) (reversing
 5 district court’s denial of intervention as of right because the Forest Service was “required to
 6 represent a broader view than the more narrow, parochial interests” of the would-be
 7 intervenors, the State of Arizona and Apache County). *Smuck v. Hobson*, 408 F.2d 175, 181
 8 (D.C. Cir. 1969) (“The school board represents all parents within the District. The
 9 intervening appellants may have more parochial interests centering upon the education of their
 10 own children. While they cannot of course ask the Board to favor their children
 11 unconstitutionally at the expense of others, they like other parents can seek the adoption of
 12 policies beneficial to their own children.”).

13 Given these differences in the interests of the Proposed Intervenors and the State
 14 Defendants, it cannot be said that the State Defendants “will undoubtedly make all of [the
 15 proposed intervenors’] arguments” and will be “capable of and willing” to make those
 16 arguments. *County of Fresno*, 622 F.2d at 438-39. *See also Central Valley Chrysler-Jeep Inc.*
 17 *v. Witherspoon*, 2005 U.S. Dist. LEXIS 26536, *20-21, No. CV-F-04-6663 REC/JLO (E.D.
 18 Cal. Oct. 20, 2005) (holding that environmental organizations were entitled to intervene as
 19 defendants in an action challenging the constitutionality of California state regulations, on the
 20 sole ground that the organizations intended to raise different arguments than the state);
 21 *Southwest Center*, 268 F.3d at 823 (holding that it was not necessary for developers seeking
 22 intervention to have identified specific differences in trial strategy, merely to show that it was
 23 likely the city would advance different arguments than the developers would).

24 State Defendants, by their acquiescence to this request, have signaled that they believe
 25 that the Potential Intervenors have important voices that should be heard. At a minimum, the
 26 Proposed Intervenors will offer the voice and perspective of individuals who personally need
 27 the protection of the Rules. Like the intervenors in *Southwest Center*, the Proposed
 28 Intervenors will “offer important elements to the proceedings that the existing parties would

likely neglect,” including “their own unique private perspectives.” *Southwest Center*, 268 F.3d at 823. As such, the Proposed Intervenors should be given leave to intervene as a matter of right.

B. Alternatively, the proposed intervenors should be granted to leave to intervene permissively pursuant to 24(b).

Even if this Court finds that the Proposed Intervenors may not intervene as of right in this action, it should grant those parties permission to intervene in this proceeding. Rule 24(b) of the Federal Rules of Civil Procedure authorizes this Court to permit intervention when “an applicant’s claim or defense and the main action have a question of law or fact in common.” The determination of whether a party will be able to intervene is within the discretion of the court, which will consider whether it will unduly delay the main action or unfairly prejudice the existing parties. Fed. R. Civ. P. 24(b).

The Court should exercise its discretion to permit the Proposed Intervenors to intervene in this case. They satisfy the requirements of Rule 24(b) because their defense of the Rules presents common questions of law and fact with those of the Defendants. They do not seek to introduce any new issues, only to defend the rule against the objections raised by Plaintiffs. Ms. Billings and Dr. Schouten, additionally, seek to ensure that all the implications involving the Rule are considered, including the impact and importance of the Rules for those with HIV, even though Plaintiffs make no mention of this constituency in their briefing. As described above, this motion is timely, and will not require any change to existing deadlines or prejudice the current parties. The significance of the Proposed Intervenors’ interests in the subject matter of this litigation outweighs any marginal additional burden that would be caused by intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 405 (9th Cir. 2002) (granting permissive intervention on the grounds that “‘streamlining’ the litigation . . . should not be accomplished at the risk of marginalizing those . . . who have some of the strongest interests in the outcome.”). Even if the Court concludes that the Proposed Intervenors do not meet the standard for intervention as of right, it should nonetheless permit intervention under Fed. R. Civ. P. 24(b).

1 **III. CONCLUSION**

2 The Proposed Intervenor should be allowed to intervene as a matter of right under
3 Fed. R. Civ. P. 24(a). Given the significance of the rights at issue, if the Court concludes that
4 the Proposed Intervenor do not meet the standard for intervention as of right, it should permit
5 them to intervene under Fed. R. Civ. P. 24(b).

6
7 August 13, 2007

Respectfully submitted,

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